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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 501

MAURICE ROSENBLATT, *Appellant,*

v.

AMERICAN CYANAMID COMPANY, *Appellee.*

On Appeal From the Court of Appeals of New York

JURISDICTIONAL STATEMENT

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No.

MAURICE ROSENBLATT, *Appellant*,

v.

AMERICAN CYANAMID COMPANY, *Appellee*.

On Appeal From the Court of Appeals of New York

JURISDICTIONAL STATEMENT

This is an appeal from an order and judgment of the New York Court of Appeals, as amended June 10, 1965, which was adopted as the order and judgment of the New York Supreme Court, Appellate Division, on June 24, 1965. The judgment denied the appellant's motion to dismiss the action for lack of jurisdiction over his person. Appellant submits this statement to

show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINION BELOW

The opinion of Judge Arthur Markewich of the New York Supreme Court is unreported, and appears in Appendix A hereto. The order and judgment of the Court of Appeals, which was adopted by the Appellate Division of the New York Supreme Court, is unreported and appears in Appendix B hereto.

JURISDICTION

This suit was commenced in the Supreme Court of the State of New York under New York Civil Practice Law and Rules § 302(a). The appellant entered a motion to dismiss for lack of jurisdiction. This motion was denied by the court, and the denial was affirmed by the Appellate Division. The order of the lower court was affirmed by the Court of Appeals on May 27, 1965, and, after amendment by the Court, became final on June 10, 1965. In accordance therewith, an order dismissing appellant's motion was filed in the New York Supreme Court on June 24, 1965. The jurisdiction of the United States Supreme Court to review this decision on appeal is conferred by 28 U.S.C. § 1257(2). The following cases sustain the jurisdiction of the Court to entertain this appeal: *Lathrop* v. *Donohue,* 367 U.S. 820, 824-825 (1961); *Williams* v. *Bruffy,* 96 U.S. 176, 183 (1878); *Lawrence* v. *State Tax Com'n,* 286 U.S. 276, 282-3 (1932).

The appeal is timely, notice of appeal having been filed in the New York Supreme Court on June 28, 1965.

Although the order appealed from disposes of a pretrial motion and the case has not yet been heard on its merits, the judgment below is a final one within the meaning of 28 U.S.C. § 1257. Jurisdiction has been asserted with finality by the state courts, and they offer no further review of that issue. Unless review can now be obtained, the appellant will be subject to an assertion of *in personam* jurisdiction in violation of basic due process guarantees of liberty and property. The state judgment is founded on an issue distinguishable from the merits and not inextricably enmeshed in the factual controversies of the case. Recent decisions make it clear that the case satisfies the requirement of finality.[1] *Local 438 Construction Laborers' Union* v. *Curry,* 371 U.S. 542 (1963); *Mercantile Nat'l Bank* v. *Langdeau,* 371 U.S. 555 (1963). See: *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

I. Whether the Due Process Clause of the Fourteenth Amendment is violated when a state "long arm" statute is so construed and applied as to find automatically, on the basis of a single alleged local act performed four years earlier, personal jurisdiction over an individual domiciled abroad, in a suit by an international corporation, without considering the individual's claim that litigation in the forum would impose so heavy and disproportionate a burden on him as to

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[1] Mr. Justice Goldberg took this same position in an opinion stating his grounds for denying an application for a stay pending disposition of our appeal. *Rosenblatt* v. *American Cyanamid Co.,* — S. Ct. — (July 13, 1965).

offend traditional standards of fair play and substantial justice.

II. Whether the Due Process Clause of the Fourteenth Amendment is violated when the forum "long arm" statute is applied to a domiciliary of a foreign country who has been named in the forum in a criminal indictment involving the same events as the civil suit, and who can appear and answer the civil suit only by submitting himself to criminal prosecution and waiving fundamental constitutional privileges, while an alternative forum is available to the corporate plaintiff without unreasonable hardship.

III. Whether the Due Process Clause of the Fourteenth Amendment is violated when a state "long arm" statute is applied to an individual domiciled abroad in a case which reveals a balance of extreme hardship against the individual defendant as against the corporate plaintiff if jurisdiction is asserted.

The elements of hardship include:

(a) defense of a suit thousands of miles from his home, requiring surrender of his employment;

(b) the unavailability of compulsory process to secure the testimony of the only witnesses who could support his claim of non-liability on the merits;

(c) the availability of a forum and personal service at his domicile, guaranteed by treaty provisions;

(d) the relative ease with which the plaintiff, a multi-million dollar corporation with offices and

plants at the defendant's domicile, could prosecute its suit at his domicile;

(e) the substantial contacts between the defendant's domicile and the alleged events giving rise to the civil suit; and

(f) the doubtful finality at the defendant's domicile of a judgment in the forum, affording no assured protection against a second suit even if the defendant won in the first forum.

IV. Whether the Due Process Clause of the Fourteenth Amendment is violated where a state "long arm" statute is construed and applied to give jurisdiction over an individual domiciled abroad, with respect to an alleged tort whose center of gravity is outside the forum.

STATUTE INVOLVED

Section 302(a)2 of the New York Civil Practice Law and Rules is set forth in Appendix C hereto.

STATEMENT

This suit was filed by the American Cyanamid Company in the Supreme Court of New York in 1964. The defendant-appellant is a United States citizen who has been domiciled in Italy since 1958. An Italian attorney served the summons and complaint by delivering a copy to the appellant at his residence in Rome. Cyanamid, the plaintiff-appellee, contends that under New York CPLR § 302(a)2 this service was sufficient to give jurisdiction *in personam* by reason of an alleged tortious act performed by the appellant in New York in 1960,

four years before the suit began. The New York Supreme Court denied the claim of the appellant that the statute so construed and applied would violate the Due Process Clause of the Fourteenth Amendment. The New York Court of Appeals affirmed this ruling, expressly declaring that in so doing it passed upon the constitutional issue.

The complaint alleges that some time prior to 1960, an employee of Cyanamid stole from it certain trade secrets, consisting of papers relating to the development and manufacture of antibiotics, and microorganisms used in the production of the same products. Cyanamid did not claim that the appellant was in any way involved in this theft. The complaint further charges that after the employee had terminated his employment, he met the appellant in Rome, and the two entered into a conspiracy to deprive Cyanamid of its ownership of the microorganisms and papers which had already been stolen. With a single exception, all of the alleged acts in connection with the "conspiracy" took place outside New York, and most of these acts took place in Italy. The single exception was the alleged transfer to the appellant, by the former employee, of four glass tubes containing antibiotic cultures, and of papers describing the manufacturing process. This transfer allegedly was made while the appellant was a transient in New York. The complaint also alleges the subsequent transfer, outside New York, and use of the materials in unfair and injurious competition. None of the competition or injury is alleged to have taken place in New York. The gist of the complaint, indicated by the prayer for damages in the amount of $5 million to cover "earnings, profits and receipts" derived from the use of the materials,

is the alleged unfair trade competition by unnamed "Italian pharmaceutical manufacturers."

The only supporting affidavit linking the appellant with the alleged acts is that of the former employee. His affidavit is directly contrary to testimony he gave under oath in a suit brought against him by Cyanamid.

Issue was joined on the jurisdictional question by the appellant's motion to dismiss, which specifically raised the constitutional issue. Appellant entered an appearance solely for the purpose of attacking the jurisdiction of the court. In order to avoid any plea that might be interpreted (either in New York or in a foreign court to which a New York judgment might be brought for enforcement) as a submission on the merits, he did not respond to the allegations that he committed a tort. The motion to dismiss was denied by the New York Supreme Court, which found that the appellant had not transacted any business in New York but was within the jurisdiction of the court because the complaint stated a cause of action in tort (a conspiracy to convert) and because the allegations included acts by the appellant performed in New York "in furtherance of the conspiracy." This was taken to satisfy the requirements of CPLR §302(a)2, which authorizes the exercise of personal jurisdiction over any non-domiciliary if in person or through an agent he "commits a tortious act within the state." *No consideration was given in the opinion to the other circumstances of the case bearing on the fairness of this application of the "long-arm" statute.*

The lower court's ruling was affirmed by the Appellate Division, but leave was granted to appeal. The New York Court of Appeals affirmed the denial of the

motion to dismiss without opinion. Subsequently, the Court of Appeals, on motion by the appellant, amended its remittitur to declare that it necessarily passed upon a question arising under the Fourteenth Amendment.[2]

THE QUESTIONS ARE SUBSTANTIAL

The federal questions in this case are substantial because the record reveals a clear instance of the assertion of "long-arm" jurisdiction under circumstances which seriously offend "traditional standards of fair play and substantial justice." The action of the New York courts takes on added significance when viewed as part of a developing pattern of state responses to the decline of the restrictive concepts embraced in *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). In the instant case there was demonstrated a failure to grasp the thrust and meaning of the Court's rulings in *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), and *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957). As a consequence, a new mechanistic approach to jurisdiction has been adopted, in disregard of the actual affiliating circumstances, the interests of the forum, and the relative fairness to the respective litigants. Such an approach to *in personam* jurisdiction violates the Due Process Clause of the Fourteenth Amendment.

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[2] The remittitur as amended by the Court of Appeals reads: "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether § 302(a)2 CPLR, as construed in this case and applied to defendant, was invalid under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals, in passing upon this contention, held that § 302(a)2 CPLR, as construed and applied, was valid."

The questions are discussed in the order set forth at pages 3-5, *supra*.

I

The fundamental point at issue in this litigation is the scope and meaning of this Court's decisions enlarging the possibilities of exercising *in personam* jurisdiction over absent defendants consistent with due process of law. It is the appellant's position that the New York courts have misinterpreted *International Shoe Co.* v. *Washington, supra,* and the ensuing cases. In that case it was said:

> But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." [326 U.S. at 316.]

What New York has done is apply one portion of this guideline and ignored an essential portion of the same ruling. "Minimum contacts" have been made a magic touchstone for the assertion of jurisdiction over the appellant. What has been ignored is that this Court also insisted that these contacts be "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

This test of due process cannot be met without analyzing all essential elements of the case which bear upon the issue of fairness. The Court has declared explicitly that "An 'estimate of the inconveniences' which would result to the [defendant] corporation

from a trial away from its 'home' or principal place of business is relevant in this connection." *International Shoe Co.* v. *Washington, supra,* 326 U.S. at 317. Surely if this is true of a corporation, it is even more applicable to an individual.

This is not to deny that some acts performed in a state might *per se* satisfy the current due process limitations on recognition of jurisdictional nexus. The acts which have been so treated, however, have involved a great potential risk of physical harm to persons and property. *Hess* v. *Pawloski,* 274 U.S. 352 (1927); *Young* v. *Masci,* 289 U.S. 253 (1933). The product liability cases are of this type. See *Nelson* v. *Miller,* 11 Ill. 2d 378, 143 N.E. 2d 673 (1957). The case at bar involves no risk of physical injury.

It is apparent from the opinion written by Judge Markewich that the New York court read § 302 as exploiting fully the jurisdiction permissible under federal due process restraints. These restraints he interpreted as requiring nothing more than some act or omission by the defendant-appellant in New York. Without opinion, the Court of Appeals necessarily decided the same thing.

In a group of cases decided the same day as the case at bar, the New York Court of Appeals wrote an opinion construing § 302(a). This opinion leaves no doubt that New York mechanically seeks a local "tortious act" and then automatically asserts or denies jurisdiction.[3] No consideration is given to the genuine interest of the state in providing a forum for the

[3] The court decided three cases in one opinion on the same day: *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke, Inc.; Feathers* v. *McLucas; Singer* v. *Walker,* 15 N.Y. 2d 443 (1965).

particular plaintiff, nor to the hardship to the parties in asserting or denying jurisdiction. Thus, the New York approach ignores the specific command of this Court in *International Shoe* and is at variance with the meaning and function of the Due Process Clause as a limitation on the assertion of jurisdiction.

It is no answer to suggest that the question of fairness is relevant only in deciding whether to apply the doctrine of *forum non conveniens.* When the degree of harshness and inequity in the exercise of long-arm jurisdiction becomes extreme, fundamental fairness—and thus due process—is impaired, which is why this Court has repeatedly recognized that elements of unfairness *must* be taken into consideration on the jurisdictional issue. As a matter of fact, it appears that the New York Courts are not even permitted to use *forum non conveniens* in most cases arising under CPLR § 302(a)2. The New York Court of Appeals has defined certain tort situations in which the case *must* be entertained. *De La Bouillerie* v. *De Vienne,* 300 N.Y. 60, 89 N.E. 2d 15 (1949). If the cause of action arose in New York, there is no discretion to refuse jurisdiction, even if all the parties are foreign citizens nonresident in New York. *Serralles* v. *Viadet,* 149 N.Y.S. 2d 175 (Sup. Ct. N.Y. Co. 1954), *aff'd,* 285 App. Div. 947 (1st Dept. 1955). While the concept of a "tortious act within New York" is arguably not fully coincident with that of "a cause of action for tort arising in New York," in most instances the locus of the act and the geographical origin of the cause of action will be the same. In any event, the two appear to coincide in the case at bar, under Judge Markewich's view that there is an alleged tort consisting of conspiracy to

convert, implemented and made actionable by an act in New York.

This is the critical error made by Mr. Justice Goldberg in his opinion denying our application for a stay, *supra* n.1. He not only assumed that New York would consider any factors bearing on hardship as part of a *forum non conveniens* argument—an assumption contrary to New York law—but also stated that these same factors are "not relevant" to the constitutional issue. It is difficult to see how the courts can consider "fundamental fairness," make an "estimate of inconveniences," or determine what is "reasonable and just" without considering the factors of hardship clearly established in this record. As Judge Schaefer, who wrote the opinion in *Nelson* v. *Miller, supra,* has warned: "Under this new approach to problems of jurisdiction the doctrine of *forum non conveniens* will assume increased importance, and its flavor of procedural due process, already strong, will be enhanced." *Cotton* v. *Louisville & Nashville R.R. Co.,* 14 Ill. 2d 144, 177, 152 N.E. 2d 385, 402 (1958) (dissenting opinion).

It is submitted that the circumstances of the instant case clearly reveal such an unfair balance of hardship against the individual defendant-appellant as to violate the Due Process Clause. At the very least, this issue was entitled to consideration and resolution by the New York courts.

II

The instant case displays an unusual feature which deserves special consideration in determining whether a "long-arm" statute can be applied to defendant-

appellant without violating due process. The defendant is under indictment in the Federal District Court in New York and can appear and defend the civil suit only by submitting to criminal jurisdiction.

It is no part of the appellant's argument that a person accused of crime has a constitutional right to escape trial. What is urged upon the Court, however, is that the record in this case reveals an interrelationship between the use of criminal process and the use of civil process which puts the appellant in an unfairly disadvantageous position. The indictment relates to the same matter as the civil suit. If the appellant answers on the merits in the civil suit, he almost certainly will waive basic constitutional rights in the pending criminal case. *Brown* v. *United States*, 356 U.S. 148 (1958). On the other hand, if he does not appear and answer, he faces the entry of an order precluding him from thereafter proving his defenses, or the entry of a judgment that could run as high as $5 million.

The supporting affidavits filed in the New York Supreme Court make it clear that the case against the appellant rests upon the testimony of a former employee of Cyanamid named Fox. Fox apparently is now giving sworn statements completely contrary to the testimony he gave under oath when he was the defendant in another civil suit for $5 million brought by Cyanamid. His cooperation with Cyanamid is not altogether surprising when one realizes that he has been found liable to Cyanamid in a civil suit, and he has not yet been sentenced on criminal charges (although he was indicted more than a year ago and subsequently pleaded guilty). Caught in the whipsaw of civil and criminal proceedings, he stands in no position

to be independent of Cyanamid. This is the key witness offered against the appellant to force him to leave his home and employment in Italy and appear in New York.

All of these facts give added weight to the claim of unfairness. Cyanamid could as easily have brought the civil action in an Italian court.[4] It has a plant in Italy, as it does in New York, and maintains offices in Italy. Neither New York nor Italy is Cyanamid's home state. Suit in New York, on the other hand, poses a cruel dilemma for the defendant-appellant. In these special circumstances it is submitted that the exercise of "long-arm" jurisdiction would be contrary to traditional standards of fair play.

III

The detailed features of the present case which combine to raise a substantial issue under the Due Process Clause involve (a) the extreme hardship to the defendant-appellant in litigating in New York, (b) the lack of any genuine interest of New York in providing a forum, and (c) the absence of any unfairness to the plaintiff-appellee in dismissing the case without prejudice.

Two key features of the fact pattern are of central importance in this connection, and they are features upon which this Court has never passed judgment. The defendant-appellant is an *individual* who is alleged to have committed a single transaction within the forum. He is also a person who is domiciled not in a sister state but in a *foreign country*. This foreign

[4] See the treaty cited at p. 17, *infra*.

domicile was not acquired after the alleged events upon which the suit is based, nor in contemplation of this conduct, but antedated it by some two years.

This Court has never approved "long-arm" jurisdiction except where both parties were based in the United States. See *International Shoe Co.* v. *Washington, supra,* 326 U.S. 310; *McGee* v. *International Life Ins. Co., supra,* 355 U.S. 220; *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Perkins* v. *Benguet Consolidated Mining Co.,* 342 U.S. 437 (1952); *Travelers Health Ass'n* v. *Virginia,* 339 U.S. 643 (1950); *Hanson* v. *Denckla,* 357 U.S. 235 (1958); *Hess* v. *Pawloski, supra,* 274 U.S. 352.

In *International Shoe Co.* v. *Washington, supra,* 326 U.S. at 317, the Court expressly declared that it was laying down jurisdictional norms to determine when it is reasonable "in the context of our federal system" to require a corporation from another state to defend in the forum state. Similarly, in *McGee* v. *International Life Ins. Co., supra,* the question was discussed only with reference to interstate parties and problems arising from a national economy in a federal nation. At no time has the Court addressed itself to the question of long-arm jurisdiction over foreign-based defendants.

The only case before this Court in which such a question was even indirectly involved is *United States* v. *First National City Bank,* 379 U.S. 378 (1965). That case involved another subsection (§ 302(a)1) of the same jurisdictional statute as the case at bar. The Court did not pass upon the constitutionality of the statute because the statute had not actually been in-

voked. The only issue was whether an injunction pendente lite could issue against the bank to preserve assets of a Uruguayan corporation which allegedly owed taxes to the United States. The Court allowed the injunction and decided no more than that there was a possibility of obtaining jurisdiction over the foreign corporation. The Court also recognized the possibility that the foreign corporation might voluntarily appear, as it had in the Tax Court. Indeed, the injunction upheld by this Court had been issued by the United States District Court in New York before § 302 had been enacted. It should also be noted that the foreign party was not an individual but a corporation, and it allegedly had engaged not in a single act but in a series of regular and substantial business transactions in New York, out of which the tax liability arose.

In terms of due process, the foreign domicile of a defendant—particularly as far away as Italy—greatly enhances the degree of hardship in being compelled to appear and defend. When this jurisdiction is based upon but a single act, and that act merely alleged rather than proven, with the allegation supported only by a demonstrated perjurer who has an obvious interest in cooperating with the plaintiff, then the unfairness is obvious. The record in this case demonstrates that this hardship is real and extreme for the defendant-appellant. Working and living in Italy, dependent upon his presence there for earning his livelihood, he is now ordered to leave his home and his employment to suit the convenience of a plaintiff whose connection with New York is hardly distinguishable from its connection with Italy. Thus, "long-arm" jurisdiction, which developed to help individual persons bring suit against foreign corporations for wrongs done in the

home state of the persons,[5] is now being applied against an individual, in favor of a foreign corporation, for a cause of action which has casual connections with the forum.

One of the serious consequences of this reversal is that the defendant-appellant is summoned to a trial thousands of miles from the place where his only witnesses can be found. The plaintiff-appellee's theory is that plans were made in Italy with officials of Italian pharmaceutical companies and pursuant thereto deliveries were made to the Italian companies. The only witnesses who can verify the defendant-appellant's case are in Italy. They are beyond the reach of any compulsory process available through the New York courts. The witnesses for Cyanamid, on the other hand, are clearly within its control. In a suit in which $5 million are allegedly at stake, this huge corporation could afford to bring its witnesses to Italy.

That an Italian forum would be available to Cyanamid is perfectly clear. It is guaranteed by the Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, Art. V(4), between the United States and Italy. Cyanamid has manufacturing facilities in Italy and maintains sales offices there. It has long conducted extensive business there and cannot view Italy as an unfriendly or remote forum. In view of these factors, to compel the individual party to answer in New York at the demand of a giant corporation is to deny fundamental fairness.

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[5] For example, in *McGee* v. *International Life Ins. Co., supra,* 355 U.S. at 223, the concern was voiced: "When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof."

One of the significant consequences of the foreign domicile of the defendant-appellant is the prospect that a New York judgment may subsequently be offered in a suit in Italy between the same parties. The interstate cases previously adjudicated operate under the Full Faith and Credit Clause, and jurisdiction which satisfies due process virtually insures the enforceability of the judgment in all sister states. Indeed, the questions of full faith and credit gave rise to the litigation settled by this Court in the *McGee* case. There is considerable doubt, however, whether a New York judgment in the instant case would be enforced by the Italian courts.

This doubt arises from the provisions of Italian law under which a foreign judgment will not be recognized unless founded upon the kind of jurisdictional nexus recognized in Italy for domestic purposes. Italian Code of Civil Procedure, § 797. It appears that Italy asserts jurisdiction over absent defendants on a different basis from New York (and different from other Western European nations as well). Italy does not accept the "tortious act" concept embraced by New York in *Feathers* v. *McLucas* and *Singer* v. *Walker, supra* n. 3. Rather, Italy asserts jurisdiction only when there is a local "wrong." This appears to be similar to the Illinois concept expressed in *Gray* v. *American Radiator & Sanitary Corp.*, 22 Ill. 2d 432, 435, 176 N.E. 2d 761, 762-763 (1961), and rejected by New York. Nor can it be said that in the present case the tortious act and the place of the wrong are identical. Neither the complaint nor the rulings of the New York courts identify New York as the place of the wrong. The conspiracy theory embraced by the New York Supreme Court may be an attempt to locate an alleged wrong in New York, but this characterization of the

place of the wrong could not be binding on the Italian courts.

This doubt concerning the enforceability of a New York judgment at the defendant-appellant's domicile provides an additional reason why due process would be offended if New York were to assert jurisdiction. Indeed, it would be prudent to reflect on the dangers of exposing United States domiciliaries to foreign judgments based on casual contact, with our courts being in a poor position to deny these judgments enforcement if we assert a similar jurisdiction over foreign domiciliaries. This kind of concern was voiced by Chief Judge Scott in a case in which Cyanamid successfully resisted being reached by the English "long-arm" rules. *George Monro, Ltd.* v. *American Cyanamid & Chemical Corp.*, [1944] 2 K.B. 432, 437 (C.A.).[6]

In short, the defendant-appellant does not attack "long-arm" jurisdiction when the forum has a realistic interest in the underlying events or transactions, and the balance of hardship to the defendant in proceeding with the case is not so great as clearly to outweigh the interests of the forum and the demands of justice for the plaintiff. In most cases where a tortious

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[6] Those who have given great thought to these problems have suggested a more restrictive exercise of long-arm jurisdiction internationally than domestically. In this connection, it is instructive to compare the Uniform Foreign Money-Judgment Recognition Act. The only tortious acts specifically stated as bases for jurisdiction entitling a foreign judgment to recognition are those involving the operation of an automobile or airplane. Sec. 5(a)(6). The possibility of an American court's recognizing other bases is left open, but the Uniform Act clearly envisions much narrower international than interstate recognition of "long-arm" judgments. 1962 Handbook of the National Conference of Commissioners on Uniform State Laws 243, 244-245.

act has been performed in the forum, that state will have a legitimate interest in protecting one of its own domiciliaries; most of the witnesses will be local; the act will either be in connection with dangerous activities or be the business act of corporate agents; and all parties will be in the United States. In the atypical case, however, where the forum's interest declines or disappears and the balance of hardship shifts, due process limitations should retain their vitality and should limit the exercise of jurisdiction. This argument can best be summarized by quoting from one of the most careful analyses of the problems created by "long-arm" statutes. Speaking particularly of the Illinois statute, which was the progenitor of New York's statute, Professor Currie has written: "I do not seriously suggest that it be altered by the legislature, but only that the courts, in interpreting it, avoid the temptation to import technical distinctions as to the place where an act has taken place and focus ininstead upon the relevant considerations of state interests and hardship to the defendant." Currie, The Growth of the Long Arm, 1963 Univ. of Ill. L. Forum 533, 585. If that were done in the instant case, a denial of due process would be found in the assertion of jurisdiction over the appellant. Instead of that, the New York courts declined to pass on any elements of unfairness and endorsed jurisdiction on the basis of a simple plea in a complaint of an alleged act within the state.

IV

Even where "long-arm" jurisdiction can validly be asserted, it is jurisdiction over the person *only with respect to causes of actions arising out of the local nexus.* In *International Shoe Co.* v. *Washington, su-*

pra, the jurisdiction was limited to claims arising from the activities in the State of Washington. As this Court said: "* * * so far as those obligations arise out of or are connected with the activities within the State, a procedure requiring the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (326 U.S. at 319.) Similarly, in *McGee* v. *International Life Ins. Co., supra,* jurisdiction was asserted only with respect to a contract covering the life of a California insured.

"Long-arm" jurisdiction is in this respect radically different from the more traditional forms of *in personam* jurisdiction. Only when the defendant is personally served within the forum, or is domiciled there, or consents to be sued there, can jurisdiction be claimed for all transitory causes of action. The distinction can best be seen by contrast in *Perkins* v. *Benguet Consolidated Mining Co., supra,* 342 U.S. 437, where the defendant's course of local dealing was sufficiently continuous to subject it to suit as a company present within the local forum.

In the case at bar the complaint reveals an effort to assert "long-arm" jurisdiction in disregard of subject-matter limitations. Judge Markewich, writing the New York Supreme Court opinion, declared that the complaint clearly stated a cause of action in the nature of a conspiracy to commit a tort, with an act in pursuance of the conspiracy being performed in New York. By applying the label "conspiracy to commit a tort," the court apparently tried to bring into a New York focus various acts which were performed outside New York. One curious feature of this label is that the New York cases are absolutely clear in rejecting the notion that a tort action can be based upon

conspiracy, with the sole exception of a conspiracy in restraint of trade. *Green* v. *Davies,* 182 N.Y. 499, 75 N.E. 536 (1905); *Solomon* v. *La Guardia,* 267 App. Div. 435, 46 N.Y.S. 2d 701 (2d Dept. 1944); *Goldstein* v. *Siegel,* 19 A.D. 2d 489, 244 N.Y.S. 2d 378 (1st Dept. 1963). The label "conspiracy" does not describe a tort or a tortious act, but is relevant only on the issue of vicarious liability of co-conspirators. In this case there is but one defendant. Conspiracy, whatever its role in criminal law, has no significance in tort law where the only named defendant is alleged to have performed the wrongful act. Conspiracy to commit a tort is not itself a tort, although acts done in furtherance of a conspiracy may be torts. The existence of a conspiracy in no way affects the question whether the acts are tortious. This is not only the law in New York, but also the prevailing view. See: Prosser, *Torts* 260 (3d ed. 1964); 1 Harper & James, *The Law of Torts* 698-699 (1956).

Appellant is not asking this court to review the New York law of conspiracy as applied in tort cases, but merely to enforce due process limitations on the subject-matter scope of "long-arm" jurisdiction. The New York misuse of its own (and the common-law) concept of conspiracy is a transparent mask for asserting jurisdiction over an alleged tort of unfair competition, with none of the competition taking place in the New York, or, indeed, anywhere in the United States, and with none of the alleged competitors even named in the suit. The $5 million tort is not the conversion of four test tubes, their contents, and some papers relating thereto. Indeed, Cyanamid declares that these items were removed from its possession and control before the appellant was in any way involved in the

events. Rather the tort is the alleged sale, outside New York, of other property allegedly produced through the use of wrongfully obtained trade secrets which the plaintiff-appellee sought to preserve in disregard of United States patent laws and United States antitrust laws.[7]

What is at stake is the question of the permissible scope of "a cause of action arising from" a tortious act within the state, in the face of due process jurisdictional restrictions. Cyanamid's position must rest upon a mechanical notion of cause and effect, under which realistic limitations on the scope of jurisdiction would virtually disappear. For example, a plaintiff who alleges injury arising from a tortious act in New York may use the New York forum even if both he and the defendant are domiciled in the same distant jurisdiction and all the witnesses are at the litigants' domicile.[8]

In the case at bar an alleged act performed with casual choice of locale is being used as a handle for New York to grasp jurisdiction over other alleged acts, all of which were performed elsewhere. This

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[7] See: *United States* v. *Chas. Pfizer & Co.* [*and American Cyanamid Co.*], 217 F. Supp. 199 (S.D.N.Y. 1963); *In re American Cyanamid Co.*, FTC Docket No. 7211, CCH Trade Regulation Reporter ¶16527 (August 2, 1963).

[8] The same indifference to the forum's interest is evidenced in the application of the companion provision, § 302(a)1, based on the transaction of business in New York. In *Singer* v. *Walker, supra* n. 3, for example, the plaintiff who received the gift of a hammer from his aunt, who in turn purchased it in New York, would have the same right to sue in New York even if he were a domiciliary of the state where the defendant manufactured the chattel. Or again, if he in turn had lent, given or sold the hammer to another child anywhere in the world, that child if injured could claim a New York forum.

is being done *not* in favor of a New York Corporation but apparently because the items described in the complaint had earlier and entirely independently been removed from a New York plant of the appellee by a person who is not a litigant in this case.

We submit that none of the previous decisions of this Court warrants such an extensive scope for "long-arm" jurisdiction. Even on this question alone, the appellant has raised a substantial issue of denial of due process.

CONCLUSION

There has been considerable confusion concerning the scope of the new jurisdictional freedom. This has been evidenced by the kind of legislation adopted to exploit the new opportunities. In some states the statutes have been limited to suits against a foreign corporation. Vt. Stat. § 1562 (1947); *Smyth* v. *Twin State Improvement Corp.*, 116 Vt. 569, 80 A. 2d 664 (1951). Md. Code Art. 23, § 119(d) (Supp. 1947); *Johns* v. *Bay State Abrasive Products Co.*, 89 F. Supp. 654, 663 (D. Md. 1950). Minn. Statute § 303.13 subd. 1(3) (Supp. 1964). In other states the statutes cover claims arising from certain forms of activity which pose a threat of physical harm to persons or property. *E.g.*, 2 Purdon's Stat. (Pa.) § 1410 (1963) (aviation). At least two states have tried to surmount the uncertainty by bootstrap phraseology. The Rhode Island statute permits the exercise of jurisdiction "in every case not contrary to the provisions of the constitution or laws of the United States." R. I. Gen. Laws 9-5-33, 34 (Supp. 1964). In New Jersey the statute makes the exercise of "long-arm" jurisdiction "subject to due process." N.J. Practice Rev. Rule 4:4-4(d) (Supp. 1965).

Judges of our highest state courts continue to be in serious and divisive doubt concerning the constitutional limitations on long-arm jurisdiction. *Chesapeake Supply & Equipment Co.* v. *Manitowoc Engineering Corp.*, 232 Md. 255, 194 A.2d 624 (1963), especially the concurring opinion at 232 Md. 567, 194 A.2d 631, and the dissenting opinion at 232 Md. 569, 574, 194 A.2d 631, 634-635; *Peters* v. *Robin Airlines*, 281 App. Div. 903, 120 N.Y.S. 2d 1 (2d Dept. 1953); *Grobark* v. *Addo Machine Co.*, 16 Ill.2d 426, 158 N.E.2d 73 (1959), and the dissenting opinion at 16 Ill.2d 438, 158 N.E.2d 80. The New York Court of Appeals in discussing the same statute involved in this case and speaking of non-resident defendants, said: "* * * the Supreme Court opened a broad and previously unavailable (although still largely undefined) area for state exercise of jurisdiction over such parties." *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke, Inc.*, *supra* n. 3. Concurring with the Court, Judge Van Voorhis said that the *International Shoe* and *McGee* cases "have left largely undefined the constitutional area for state exercise of jurisdiction over non-residents. It is desirable that this constitutional area become defined, as it probably will be by individual cases in course of time." *Ibid.*

Other courts which have had to decide these jurisdictional issues have been frank to admit that the existing decisions of this Court provide an inadequate guide. The Vermont Supreme Court said: "It has been made apparent already in what has been written that the instant case can be decided either way on argument from existing authority." *Smyth* v. *Twin State Improvement Corp.*, 116 Vt. 569, 577, 80 A. 2d 664, 669 (1951). Some other courts have taken a less

permissive view of due process limitations but have had similar difficulty. *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F. 2d 502 (4th Cir. 1956).

The American Law Institute publishes very uncertain counsel on this matter. The Restatement of Judgments § 23 (1942) informs us that "long-arm" jurisdiction can be asserted against an individual not domiciled within the state who "does acts or owns things in a State which are of a sort dangerous to life or property." A caveat reserves opinion as to whether this jurisdiction may be extended to acts or things not dangerous to life or property. The same provision was inserted in the Restatement of Conflict of Laws § 84 (1948 Supp.). The Restatement of the Law Second removes this caveat and recognizes jurisdiction based upon doing an act "within limitations of reasonableness appropriate to the relationship derived from the act." *Restatement (Second), Conflict of Laws* § 84 (Tent. Draft No. 3, 1956). The accompanying comment says that where the act is not dangerous to life or property, "the state must have closer contacts with the defendant than would otherwise be necessary to permit it to exercise judicial jurisdiction over him as to causes of action arising out of the act." The comment also emphasizes that the degree of inconvenience is relevant in determining the existence of jurisdiction, not simply whether *forum non conveniens* should be applied.

The treatise writers are in agreement that due process requirements are presently obscure. "The Supreme Court has not yet answered the question whether it will be considered reasonable that a single occurrence of liability creating conduct within a state should afford an appropriate basis for judicial jurisdiction,

assuming an appropriate statute and the meeting of all the other requisites such as service of process." Goodrich and Scoles, *Conflict of Laws* 125-126 (4th ed. 1964). Similar doubts are expressed in Ehrenzweig and Louisell, *Jurisdiction in a Nutshell* 24 (1964) and Note, Developments in the Law—State Court Jurisdiction, 73 Harv. L. Rev. 909, 945 (1960).

Obviously, this uncertainty works particular hardships on a foreign defendant, served with process at his domicile abroad, and faced with the necessity of deciding at his peril whether jurisdiction over him has been validly obtained.

In this situation there is a distinct danger that jurisdictional rules will develop mechanically rather than equitably. As one writer has warned, the preoccupation with "minimum contacts" may easily become as rigid and irrational a requirement as the old *Pennoyer* rules. Ehrenzweig, *Conflict of Laws* 118 (1959).

This uncertainty, we submit, calls for an opinion from this Court. The appellant's claim that the record in this case poses substantial issues under the Due Process Clause of the Fourteenth Amendment is given added dimension by the wider public need.

Respectfully submitted,

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Attorneys for Appellant

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APPENDIX A

SUPREME COURT: NEW YORK COUNTY

Special Term: Part I

Index No. 7222/64

[Same Title]

ARTHUR MARKEWICH, J.:

The defendant moves pursuant to Rule 3211(a)(8) CPLR on the ground that the court does not have jurisdiction of his person.

The complaint alleges that a former employee of plaintiff stole certain valuable microorganisms and trade secrets, and that defendant and certain unnamed Italian drug companies conspired with the said employee to convert the stolen matter.

Service of the summons and complaint was made on the defendant pursuant to section 302 CPLR. At the outset, the court is of the opinion that subdivision (a)(1) does not apply, as on the facts presented it cannot be said that the defendant transacted any business within the state. If jurisdiction was effected, it was pursuant to subdivision (a)(2). If the defendant committed a tortious act within the state, jurisdiction could be acquired under the single act statute.

Certain facts are undisputed. The defendant is a citizen of the United States, but, since October 3, 1958, has resided in Rome, Italy, and was served in Rome with the summons and complaint. The former employee did steel the matter on which the complaint is based.

The complaint alleges a conspiracy to convert. This is an actionable tort. The practice commentary concerned with section 302 states: "With the enactment of this statute, New York has decided to exploit the fullest jurisdictional potential permissible under federal jurisdictional

restraints'' (7B McKinney's Consolidated Laws, section 302, page 428).

To acquire jurisdiction this court must find that the defendant personally or through an agent, is the author of acts or omissions within the state and that the complaint states a cause of action in tort arising from such conduct (Nelson v. Miller, 11 Ill. 2d 378, 393). This Illinois case is particularly applicable as our statute is derived from section 17 of the Illinois Civil Practice Act.

At this stage of the action, the court is not concerned with the ultimate liability of the defendant. The complaint states a cause of action in tort. Sufficient has been shown to indicate that the defendant and his alleged co-conspirator were in this state and performed acts in furtherance of the conspiracy. Hence, the minimum contacts are established to confer jurisdiction.

Accordingly, the motion is denied.

A. M.

Dated, July 31, 1964

APPENDIX B

COURT OF APPEALS

No. 74

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 27th day of May in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND, *Chief Judge,* Presiding.

RAYMOND J. CANNON, *Clerk.*

Remittitur May 27, 1965.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Donald H. Rivkin, of counsel

for the appellant, and by Mr. Helmuth F. Furth, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is affirmed, with costs. Question certified answer in the affirmative. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether § 302 (a) 2 CPLR, as construed in this case and applied to defendant, was invalid under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals, in passing upon this contention, held that § 302 (a) 2 CPLR, as construed and applied, was valid.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs. Question certified answered in the affirmative, as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON

Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerks Office,
Albany, May 27, 1965.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

RAYMOND J. CANNON
Clerk.

No. 74

AMERICAN CYANAMID COMPANY, *Respondent,*

v.

MAURICE ROSENBLATT, *Appellant.*

BE IT REMEMBERED, That on the 17th day of February in the year of our Lord one thousand nine hundred and sixty-five, Maurice Rosenblatt, the appellant in this cause, came here unto the Court of Appeals, by Busby & Rivkin, his attorneys, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And American Cyanamid Company, the respondent in said cause, afterwards appeared in said Court of Appeals by Donovan, Leisure, Newton & Irvine, its attorneys.

Which said return thereto, filed as aforesaid, are hereunto annexed.

APPENDIX C

New York Civil Practice Law and Rules § 302(a)2:

> A court may exercise jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section—in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he: * * * 2. Commits a tortious act within the state except as to a cause of action for defamation of character arising from the act.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 501

MAURICE ROSENBLATT, *Appellant*

v.

AMERICAN CYANAMID COMPANY, *Appellee*

MOTION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 501

MAURICE ROSENBLATT, *Appellant*

v.

AMERICAN CYANAMID COMPANY, *Appellee*

MOTION FOR REHEARING

Appellant respectfully prays that this Court grant a rehearing of its order of November 15, 1965, dismissing the appeal, and that this Court note the existence of a substantial federal question and entertain oral argument thereon.

REASONS FOR GRANTING THE REHEARING

1. After the filing of the Appellant's Jurisdictional Statement, the parties entered into negotiations with a view to settling this case. The Appellee requested an extension of the time for filing a motion to dismiss.

This request was expressly based upon the negotiations then in progress. An extension until October 27, 1965, was granted by Mr. Justice Harlan on September 16, 1965.

2. Before the expiration of said extension, the Appellee requested a further extension for the same reason. The Appellant joined in this request and the parties assumed that the request would be treated the same as the previous one.

3. It is Appellant's understanding and belief that this second request also went to Mr. Justice Harlan. Before it had been acted upon, this case was erroneously put on the calendar for consideration by the Court. Mr. Justice Harlan was not participating in the decision on this case, and presumably the existence of a pending application for an extension of time was not brought to the attention of the Court. We assume, therefore, that the Court treated the case as if time for filing a motion to affirm or dismiss had elapsed and no such motion had been filed, whereas actually a timely motion for an extension was then pending.

4. The Order of this Court was entered before the Appellee had filed any motion on the merits, and while the parties were still negotiating with a view towards settlement.

5. The conduct of both parties in requesting postponement of the Court's action shows their awareness of the complexity of the issues involved. The premature action of this Court caused the appeal to be dismissed on incomplete papers, and would not have occurred had this Court been aware of the application of the Appellee for an extension.

6. Negotiations are still in progress and the interests of justice require that this Appeal be considered in proper time and on a proper set of papers.

7. If the Order dismissing the Appeal is allowed to stand, the parties may be forced to engage in a complicated trial, involving persons and actions on two continents, without any indication of the scope of jurisdiction which the New York court may assert consistently with due process. This issue is set forth in Question IV in Appellant's Jurisdictional Statement (pp. 20-24), and arguments addressed to this point, either in a motion to dismiss or orally, would further demonstrate the substantial nature of the issue.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement, it is respectfully urged that the Order of the Court dated November 15, 1965, be withdrawn, that the consideration of jurisdiction over the appeal be postponed until the Appellee has had an opportunity to file a motion, and that the Court then enter an order noting probable jurisdiction.

Respectfully submitted,

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Attorneys for the Appellant

December 9, 1965

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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